FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 14 1942
CHARLES ELMORE CROPLEY
CLERK

Nos. 325, 326

In the Supreme Court of the United States

OCTOBER TERM, 1942

JEROME PARKER JEROME, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTIONS FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITIONS FOR WRITS OF CERTIORARI

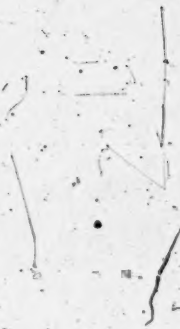
INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Argument	6
Conclusion	14

CITATIONS

Cases:	
Aderhold v. *Soileau*, 67 F. (2d) 259	14
Finch, In re, 156 Wash. 609	7
Hodgskin, Matter of, 193 App. Div. (N. Y.) 217	7
Hudspeth v. *Melville*, 127 F. (2d) 373	6, 14
Hudspeth v. *Tornello*, 128 F. (2d) 172, now pending on petition for writ of certiorari, No. 163, October Term, 1942	6, 14
Kerl, In re, 32 Idaho 737	7
Kirby, In re, 10 S. D. 322	7
Minner, In re, 133 Kan. 789	7
O'Connell, In re, 184 Cal. 584	7
Seitz v. *State Medical Board*, 24 Ohio App. 154	7
State ex rel. Anderson v. *Fousek*, 91 Mont. 448	7
State v. *Merriweather*, 136 Kan. 337	7
Statutes:	
Act of May 14, 1930, c. 274, 46 Stat. 327, Sec. 9, as amended (18 U. S. C. 753h)	4
Act of May 18, 1934, c. 304, 48 Stat. 783:	
Sec. 1, as amended (12 U. S. C. 588 (a))	3
Sec. 2, as amended (12 U. S. C. 388b (a))	2
Public Laws of Vermont (1933):	
Sec. 8485	6
Sec. 8750	6
Miscellaneous:	
78 Cong. Rec. 5738, 8132–8133, 8264, 8322, 8778, 8857	11
H. Rep. No. 1461, 73d Cong., 2d Sess	11
H. Rep. No. 1598, 73d Cong., 2d Sess	11
1 *Law and Contemporary Problems* (1934) 445, 448–449	12
S. 2841, 73d Cong., 2d Sess., Secs. 2 and 3	10
S. Rep. No. 537, 73d Cong., 2d Sess	10

491222—42——1



In the Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 325, 326.

JEROME PARKER JEROME, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTIONS FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITIONS FOR WRITS OF CERTIORARI

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 40–64) are not yet reported.

JURISDICTION

The judgments of the circuit court of appeals were entered August 3, 1942 (No. 325, R. 68; No. 326, R. 69). The petitions for writs of certiorari were filed August 21, 1942. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February

13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. In No. 325 the question presented is the same as that involved in *Tornello* v. *Hudspeth*, No. 163, now pending on petition for a writ of certiorari, *i. e.*, whether the words "any felony" in the clause of the Bank Robbery Act interdicting entry of a bank with intent to commit "any felony or larceny" include felonies under the law of the state in which the particular bank is located.

2. If the question in No. 325 is answered in the negative, the petition in No. 326 raises the question whether Section 9 of the Act of May 14, 1930, as amended, is violated by one who escapes while in custody of a United States Marshal under a warrant charging entry of a national banking institution with intent to commit a felony under the law of the state.

STATUTES INVOLVED

Section 2 (a) of the Act of May 18, 1934, c. 304, 48 Stat. 783, as amended by the Act of August 24, 1937, c. 747, 50 Stat. 749 (12 U. S. C. 588b (a)), commonly called the Bank Robbery Act, reads as follows:

> Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money

or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank,[1] or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

---

[1] Defined in Section 1 of the Act of May 18, 1934, c. 304, 48 Stat. 783, as amended by Section 333 of the Act of August 23, 1935, c. 614, 49 Stat. 720 (12 U. S. C. 588a), as including "any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States and any insured bank as defined in subsection (c) of section 12B of the Federal Reserve Act, as amended [any bank the deposits of which are insured by the Federal Deposit Insurance Corporation]."

Section 9 of the Act of May 14, 1930, c. 274, 46 Stat. 327, as amended by the Act of August 3, 1935, c. 432, 49 Stat. 513 (18 U. S. C. 753h), provides in part:

> Any person * * * who is in custody by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or who is in custody of an officer of the United States pursuant to lawful arrest, who escapes or attempts to escape from such custody * * * shall be guilty of an offense. If the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense whatsoever, the offense of escaping or attempting to escape therefrom shall constitute a felony and any person convicted thereof shall be punished by imprisonment for not more than five years or by a fine of not more than $5,000, or both; * * *. The sentence imposed hereunder shall be in addition to and independent of any sentence imposed in the case in connection with which such person is held in custody at the time of such escape or attempt to escape. * * *

STATEMENT

On October 16, 1941, petitioner was indicted in the District Court for the District of Vermont for unlawfully, wilfully, and feloniously entering the Howard National Bank and Trust Company of Rutland, Vermont, a national bank and a member of the Federal Reserve System, with intent to com-

mit "a felony, to wit, knowingly, wilfully and feloniously to utter and publish to said bank, as true, a promissory note in the amount of Five Hundred Dollars ($500), with the endorsement thereon of 'Henry S. Derby,' which endorsement was forged, the [petitioner] well knowing said endorsement to be forged, with intent to defraud said bank and the said Henry S. Derby" (No. 325 R. 2, 5–6). A second indictment was returned against petitioner on February 12, 1942, which charged that on November 15, 1941, he unlawfully, wilfully, and feloniously escaped from the custody of the United States Marshal for the District of Vermont while being held by virtue of a warrant issued on August 1, 1941, by a United States Commissioner for the District of Vermont charging petitioner with having feloniously entered a national banking institution with intent to commit a felony (No. 326, R. 2, 4–5). On April 8, 1942, after separate jury trials (No. 325, R. 10; No. 326, R. 9), petitioner was convicted on both indictments (No. 325, R. 32; No. 326, R. 36) and was sentenced to imprisonment for one year and a day on each, the sentences to run consecutively (No. 325, R. 33; No. 326, R. 37).

On appeal the court below affirmed the convictions (No. 325, R. 65; No. 326, R. 69). The judgment of affirmance in No. 326, the escape case, was unanimous, but in No. 325 Judge Frank dissented; he was of the opinion that the words "any felony" in Section 2 (a) of the Bank Robbery Act should

be limited to offenses which are felonies under federal law and which affect the banks covered by the statute, and should not be construed as embracing felonies under state law (No. 325, R. 52–64).[1]

ARGUMENT

1. Petitioner's sole contention in No. 325 is that the words "any felony," as used in the second clause of Section 2 (a) of the Bank Robbery Act (*supra*, pp. 2–3), do not include felonies under state law.[2] The majority of the court below, like the majority of the Tenth Circuit in *Hudspeth* v. *Melville*, 127 F. (2d) 373, and *Hudspeth* v. *Forbello*, 128 F. (2d) 172, now pending on petition for a writ of certiorari (No. 163), held that in the light of the language, the history, and the purposes of

[1] Since petitioner does not question the sufficiency of the evidence in either case, it is unnecessary to delineate the proof adduced at the trials. The evidence, however, is summarized in the opinion of the circuit court of appeals (No. 325, R. 41–42).

[2] Petitioner does not question that uttering and publishing a promissory note bearing a forged endorsement is a felony under Vermont law. Section 8485 of the Public Laws of Vermont (1933) provides: "A person who utters and publishes as true a forged, altered or counterfeited record, deed, instrument or other writing mentioned in the preceding section [including a promissory note or any endorsement or assignment of a note], knowing the same to be false, altered, forged, or counterfeited, with intent to injure or defraud a person, shall be imprisoned in the state prison not more than ten years and fined not more than one thousand dollars." Section 8750 provides: "Offenses which may be punished by death or imprisonment in the state prison are felonies; all other offenses are misdemeanors."

the statute these words do comprehend state felonies."

In our memorandum in opposition in the *Tornello* case we have fully discussed the considerations which in our view impel the conclusion that Congress intended by the use of the words "any felony" to include at least such state felonies as affect the financial condition of a bank.[1] In this

[1] The opinion below is somewhat broader than the view expressed by the Tenth Circuit in the *Melville* case and followed in the *Tornello* case; the latter court construed the statute as including only acts denounced as felonies under state laws which have relation to the protection, preservation, and efficiency of banks, whereas the court below thought that the statute embraces all state felonies (see No. 325, R. 48, 49–51). The Tenth Circuit apparently adopted the more narrow construction in order to avoid possible constitutional difficulties (see the comments of Judge Huxman, dissenting in the *Melville* case, 127 F. (2d), at 377). However, there is no occasion to consider whether the statute should be so limited because in both the *Tornello* and the instant cases the state felonies involved unquestionably affect the financial condition of a bank (see our memorandum in opposition in the *Tornello* case, No. 163, p. 6, and n. 14, p. 14).

[2] The interpretation that the words "any felony" in the statute include state felonies is supported also by numerous state decisions construing "felony," as used in state statutes, as embracing not only state felonies but federal felonies as well. *In re O'Connell*, 184 Cal. 584 (1920); *In re Keel*, 32 Idaho 737, 741–742 (1920); *In re Misner*, 133 Kan. 789, 790–793 (1931); *State ex rel. Anderson* v. *Fousek*, 91 Mont. 448, 454–455 (1932); *Matter of Hodgskin*, 193 App. Div. (N. Y.) 617 (1920); *Seitz* v. *State Medical Board*, 24 Ohio App. 154, 158–159 (1926); *In re Kirby*, 10 S. D. 322, 328 (1897); *In re Finch*, 156 Wash. 699 (1930). Cf. *State* v. *Merriweather*, 136 Kan. 337, 339 (1932), where a state statute providing

memorandum it will suffice to consider the arguments advanced by the dissenting judge below in support of his view that this language embraces only federal felonies.

a. The first argument of the dissenting judge is that the 1937 amendments of Section 2 (a) of the Bank Robbery Act—one making larceny of property exceeding $50 in value a felony and larceny of property not exceeding $50 in value a misdemeanor, and the other punishing entering or attempting to enter a bank with intent to commit any felony or larceny—"nicely correlate," the first change making stealing from a bank either a federal felony or federal petit larceny, and the second making it a federal crime to enter or attempt to enter a bank with intent to commit "such a federal felony or federal larceny" (R. 54). It will be observed, in the first place, that this suggested construction is much narrower than that adopted later in the dissenting opinion as the proper one. The proper construction of "any felony," according to the dissenting judge, is *any* federal felony affecting national banks (R. 54, 60). Apart from this inconsistency, the history of the amendments shows that the conclusion is untenable. As we pointed out in our memorandum in opposition in the *Tornello* case (pp. 8, 10–11), at

---

that a person convicted a second time of felony shall be confined in the penitentiary not less than double the time of the first conviction, was held to be applicable to a person previously convicted of a felony in another state.

the time the House Judiciary Committee inserted the words "any felony or larceny," larceny of any money or property from a bank, regardless of value, was punishable, under the clause immediately following, by imprisonment for not more than twenty years, and was therefore a felony. The distinction between larceny of money or property exceeding $50 in value and larceny of money or property not exceeding $50 in value, the former being made a felony and the latter a misdemeanor, was not made until after the bill had reached the floor of the House. Hence, the word "larceny" does not have the significance which the dissenting judge attaches to it. On the contrary, since the Committee's draft had made any larceny a felony, there was no need for the Committee to include larcenies if it was speaking only of federal felonies.[6]

b. The next argument is based on the legislative history of the original Bank Robbery Act of May

[6] The majority below was in error when it stated that the phrase "any felony or larceny" was substituted for "any larceny or other depredation" on the floor of the House in order to meet an objection that the bill as reported by the Committee placed simple larceny on the same plane as robbery and breaking and entering (No. 325, R. 45–46). As pointed out in our memorandum in opposition in the *Tornello* case (pp. 9, 10–11), this change was made in Committee. This error, however, does not affect the validity of the majority's interpretation; the action of the Committee in inserting the substituted phrase indicates that it meant to define burglary in the modern sense as entry with intent to commit a felony and thus supports the view that it meant any felony, state or federal (*ibid.*)

18, 1934 (R. 54–56). It is pointed out that the Attorney General's draft of that statute would have made it an offense to break into a bank with intent to commit any felony under federal or state law, but that Congress rejected the proposal.[1]

---

[1] S. 2841, 73d Cong., 2d sess., which subsequently became the original Bank Robbery Act of May 18, 1934, contained, in addition to the sections which later became law, the following two sections when it was passed by the Senate (78 Cong. Rec. 5738):

"SEC. 2. Whoever, not being entitled to the possession of property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, takes and carries away, or attempts to take and carry away, such property or money or any other thing of value from any place (1) without the consent of such bank, or (2) with the consent of such bank obtained by the offender by any trick, artifice, fraud, or false or fraudulent representation, with intent to convert such property or money or any other thing of value to his use or to the use of any individual, association, partnership, or corporation other than such bank, shall be punished by a fine of not more than $5,000 or imprisonment for not more than 10 years, or both.

"SEC. 3. Whoever breaks into, or attempts to break into, any building or part thereof used as a place of business by any bank, with intent to commit in such building or part thereof so used any offense defined by this act or any felony under any law of the United States or under any law of the State, District, Territory, or possession where such building is located, shall be fined not more than $5,000 or imprisoned not more than 10 years, or both."

These sections were in the draft proposed by the Attorney General and were recommended by the Senate Judiciary Committee (see S. Rep. No. 537, 73d Cong., 2d sess.). The House Judiciary Committee, however, in recommending the

From this it is argued that the failure of the Attorney General, in submitting his proposed amendments in 1937, to suggest any reference to state law—"obvious verbiage if the purpose was to include state-law felonies" (R. 55)—indicates that no such purpose was entertained. But the Attorney General's draft, as we pointed out in our memorandum in opposition in the *Tornello* case (p. 8), did not refer to "felony" at all; it proposed to penalize entering or attempting to enter a bank with intent to commit "any larceny or other depredation." It was the House Judiciary Committee that substituted the word "any felony or larceny." Nor is it reasonable to assume from the Committee's failure to specify expressly that federal and state felonies were included, that state felonies were intended to be excluded. Instead, the comprehensive language used by the Committee, when interpreted in the light of the purpose of the amendments to broaden the scope of federal protection, indicates that the Committee

---

enactment of the bill, amended it by striking out the above sections entirely and making Sections 4, 5, and 6 of the bill as passed by the Senate, Sections 2, 3, and 4, respectively (H. Rep. No. 1461, 73d Cong., 2d sess.). The bill, as so amended, was passed by the House (78 Cong. Rec. 8132-8133). When the Senate disagreed to the House amendments, which the House insisted upon (78 Cong. Rec. 8264, 8322), a conference was called, and the bill was finally passed with the House amendments (H. Rep. No. 1598, 73d Cong., 2d sess.; 78 Cong. Rec. 8778, 8857).

intended to include at least all felonies affecting banks, whether state or federal (see memorandum in opposition in the *Tornello* case, pp. 9–10).

c. It is further argued (R. 57–58) that it is "highly unlikely" that Chairman Sumners of the House Judiciary Committee, whose objections led to the elision of the fraud provisions contained in Section 2 of the Senate's version of the 1934 bank robbery bill (see footnote 7, *supra*), and who introduced in the House the bill containing the amendments proposed by the Attorney General in 1937, abandoned those objections in 1937 without explanation and "urged legislation which not only covered the crime of fraud on a bank * * * but went much further." Aside from the highly speculative nature of this argument, and aside from the fact that it confuses fraud and entry with intent to commit a felony consisting of fraud, it should be pointed out that Chairman Sumners was also opposed to the larceny provision contained in Section 2 of the Senate's version of the 1934 bill.[8] Yet he did not oppose the larceny provisions of the 1937 amendments. In fact, he introduced the draft of the bill submitted by the Attorney General (see memorandum in opposition in the *Tornello* case, p. 8). There is, therefore, no reason to suppose that he was opposed to amend-

[8] See 1 *Law and Contemporary Problems* (1934) 445, 448–449.

ing the law in 1937 to punish the entering of a bank with intent to commit a felony consisting of fraud.

d. The fact that, under the majority's interpretation, forgery itself is not a federal offense, while entering a bank with intent to commit forgery is a federal offense, provided that forgery is a felony under the state law, is referred to by the dissenting judge as an "outstanding awkwardness" and "curious consequence" of that interpretation (R. 58–59). This is but a criticism of the wisdom of the law in failing to go far enough in protecting national banks, and hence not a subject of judicial concern. Moreover, the proffered difficulty (R. 58) that, if a man enters a bank with intent to commit the state crime of forgery, he is, under the majority's interpretation, guilty of a federal crime, even if that intent is frustrated, applies equally to the interpretation that the words "any felony" refer only to federal felonies.[9]

2. In his petition in No. 326, petitioner concedes (Pet. 2) that his conviction under Section 9 of the Act of May 14, 1930, as amended (18 U. S. C. 753h,

[9] Other "awkward" consequences (R. 59–60) are based on the supposition that the words "any felony" include felonies bearing no relation to the protection of national banks and the currency. However, as pointed out above (see footnote 4), the question whether such felonies are included is not presented because the felony involved here bears a direct relationship to the protection of a bank.

supra, p. 3) was proper if the indictment under Section 2 (a) of the Bank Robbery Act stated a federal offense, but he contends that if that indictment did not state a federal offense he was not required to "resort to legal process" to obtain his release from custody, but was entitled to "employ self help" to regain his liberty (Pet. 2–3). We think this contention is utterly without merit. The statute, as the circuit court of appeals said (R. 51), "clearly is intended to reach anyone who is held by virtue of any proper and legal process." See also, *Aderhold* v. *Soileau*, 67 F. (2d) 259, 260 (C. C. A. 5).

CONCLUSION

The decision of the circuit court of appeals in No. 325 construing the words "any felony" in the Bank Robbery Act as including felonies under state law is in substantial accord with the construction adopted by the Tenth Circuit in *Hudspeth* v. *Melville*, 127 F. (2d) 373, and followed by that court in *Hudspeth* v. *Tornello*, 128 F. (2d) 172, which is now pending on petition for a writ of certiorari (No. 163). That construction is consistent with the language, history, and purpose of the statute, and since there is uniformity of decisions among the two circuit courts of appeals which have had occasion to consider the question, we submit that the petition for a writ of certiorari should be denied.

The decision below in No. 326 is clearly correct, and no conflict of decisions or question of importance is presented. The petition in this case should also be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
WALTER J. CUMMINGS, JR.,
Attorneys.

SEPTEMBER 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942